Mkini Dotcom Sdn Bhd & Ors v Chief Judge of Malaya & Ors

HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW APPLICATION NO 25-164-06 OF 2015
ASMABI MOHAMAD J
3 AUGUST 2015

Civil Procedure — Judge — Chief Judge of Malaya — Whether Chief Judge's decision to assign hearing of suit to particular High Court judge amenable to judicial review — Courts of Judicature Act 1964 ('CJA') s 20 — Chief Judge directed judge who had been transferred out of Kuala Lumpur to hear suit filed at Kuala Lumpur High Court — Whether Chief Judge had absolute discretion and power to direct distribution of work among High Court judges — Whether exercise of power under s 20 of the CJA lacked necessary public law element to make decision taken amenable to judicial review

The second and third respondents had filed a civil suit ('the suit') against the applicants in the High Court at Kuala Lumpur. The first applicant owned a website. The second and third respondents were, respectively, the website's editor-in-chief and chief editor. On the first case-management of the suit in June 2014 before the court's deputy registrar, the parties were told the suit would be heard by Justice Datuk Wira Kamaludin bin Mohd Said ('Datuk Wira'), who was then a judicial commissioner. The applicants applied to recuse Datuk Wira on the ground the third respondent, as the Prime Minister of Malaysia, had a determining role in appointing Datuk Wira as a High Court judge. By the time the recusal application came up for hearing some five months later, Datuk Wira had been appointed as a High Court judge and the applicants withdrew their application. Two months later, Datuk Wira was transferred to the High Court at Seremban. On 13 February 2015, the deputy registrar informed the applicants during case management that Datuk Wira had been assigned to continue to hear the suit as well as an application by the second and third respondents to strike out the applicants' defence and counterclaim. The applicants' solicitors wrote to the first respondent's office seeking confirmation whether he had, in fact, appointed Datuk Wira to hear the suit in view of the latter's transfer. The first respondent's office confirmed that Datuk Wira had been directed to hear the suit as he was familiar with the matter. Following further correspondence between the parties, the first respondent's office finally reiterated that Datuk Wira would hear the suit until its conclusion and that, if the applicants wanted to do so, they could apply for his recusal and request for another judge to hear the suit. In their instant application for leave to apply for judicial review, the applicants sought a declaration that the first respondent's decision to assign the hearing of the suit to Datuk Wira had no lawful basis – that, in fact, it was ultra vires s 20 of the

Courts of Judicature Act 1964 ('the CJA') and illegal for being in contravention of not only s 20 but also arts 122AA, 5(1) and/or 8(1) of the Federal Constitution. Alleging that it was unreasonable and contrary to usual practice for a judge who had been transferred out of Kuala Lumpur to be assigned to hear the suit in Kuala Lumpur, the applicants sought an order of certiorari to quash the first respondent's decision and an order of mandamus directing him to assign a judge of the civil division at the High Court at Kuala Lumpur to hear the suit.

Held, dismissing the application for leave:

(1) Under O 53 r 3(6) of the Rules of Court 2012, an application for judicial review had to be made 'in any event within three months from the date when the grounds of application first arose or when the decision was first communicated to the applicant'. As the applicants had filed their judicial review application on 12 June 2015, they were 29 days out of time. This was based on the admitted fact that the first respondent's decision was communicated to the applicants' solicitors by the deputy registrar on 13 February 2015 during case management of the civil suit. As the application was made out of the time prescribed by O 53 r 3(6), this court had no jurisdiction to hear the same. The application was therefore frivolous and vexatious and on this ground alone ought to be dismissed (see paras 13, 16 & 27).

(2) The applicants' contention that the application was filed within time, as time only began to run from the first respondent's letter of 16 March 2015 to the applicants, was rebutted by the contents of the applicants' own letter dated 3 March 2015 to the first respondent stating that they had been informed by the deputy registrar during case management (on 13 February 2015) that the civil suit and any interlocutory matters therein would be heard by Datuk Wira despite the fact the latter had been transferred to the High Court at Seremban. The applicants' contention that it was not apparent at the case management date whether it was the first respondent who had made the decision was a feeble attempt to get around the limitation period. The applicants knew all along that the decision was made by the first respondent and their letter to him merely sought confirmation that such a direction was in fact made (see paras 17–18, 20 & 22).

(3) The directions and/or decisions of the first respondent under s 20 of the CJA pertaining to the distribution of business among judges of the High Court were not amenable to judicial review nor were they appealable. Under s 20, the first respondent had absolute discretion and power to direct the 'distribution of business' among the judges of the High Court of Malaya and to make directions of a general or particular nature concerning the distribution of work. The power provided under s 20 of

the CJA was exclusively a domestic matter concerning the internal management of allotting or dispensing work among the judges of the High Court and therefore it did not possess the necessary public law element for it to be amenable to judicial review (see paras 28–31, 37 & 45).

(4) If directives given by the first respondent under s 20 of the CJA were open to challenge, it would bring the business of the High Court to a grind and chaos to the administration of justice. This was a strong compelling reason to exclude from the nature of the power that was exercised in the instant case, the general assumption that power that stemmed from statute was amenable to judicial review. Section 20 of the CJA provided no conditions or limitations in the exercise of the power which was necessary to inject the element of public law in the decision made so as to attract the remedies of administrative law (see paras 46–47).

(5) Although s 20 of the CJA did not confer any right, whether directly or by implication, on the parties to object that the judge assigned to hear any proceeding ought to be replaced by another, this did not mean parties were without remedy as they had the right and liberty to apply for recusal of any judge assigned to hear their matter (see para 48).

(6) The facts in the instant case showed the suit was to be heard by Datuk Wira pursuant to the first respondent's 'general' power to distribute the business prevailing at the Kuala Lumpur High Court. Upon Datuk Wira's transfer to the High Court at Seremban, the first respondent made a direction pursuant to his 'particular' power for the said judge to continue hearing the matter. Both directions were manifestations of the exercise of power conferred on the first respondent by s 20 of the CJA. Had Datuk Wira remained at the High Court at Kuala Lumpur and not been transferred, there would have been no issue of his hearing the suit upon the recusal application having been withdrawn (see paras 49–50).

[Bahasa Malaysia summary

Responden kedua dan ketiga telah memfailkan guaman sivil ('guaman') terhadap pemohon di Mahkamah Tinggi Kuala Lumpur. Pemohon pertama memiliki laman web. Responden kedua dan ketiga adalah, masing-masing, ketua sidang pengarang dan ketua editor. Pada pengurusan kes guaman pada Jun 2014 di hadapan timbalan pendaftar mahkamah, pihak-pihak dimaklumkan bahawa guaman akan didengar oleh Hakim Datuk Wira Kamaludin bin Mohd Said ('Datuk Wira'), pada masa itu merupakan pesuruhjaya kehakiman. Pemohon memohon untuk penarikan diri Datuk Wira atas alasan reponden ketiga, sebagai Perdana Menteri Malaysia, mempunyai peranan dalam menentukan pelantikan Datuk Wira sebagai hakim Mahkamah Tinggi. Pada masa permohonan menarik diri didengar kira-kira lima bulan kemudian, Datuk Wira telah dilantik sebagai hakim

Mahkamah Tinggi dan pemohon menarik balik permohonan mereka. Dua bulan kemudian, Datuk Wira telah dipindahkan ke Mahkamah Tinggi di Seremban. Pada 13 Februari 2015, timbalan pendaftar memaklumkan kepada pemohon semasa pengurusan kes Datuk Wira telah ditugaskan untuk terus mendengar guaman serta permohonan responden kedua dan ketiga untuk membatalkan pembelaan dan tuntutan balas pemohon. Peguam pemohon menulis kepada pejabat responden mendapatkan pengesahan sama ada dia telah, sebenarnya, melantik Datuk Wira untuk mendengar guaman berikutan pemindahan yang kedua itu. Pejabat responden pertama mengesahkan bahawa Datuk Wira telah diarahkan untuk mendengar guaman itu memandangkan dia biasa dengan perkara itu. Berikutan surat-menyurat antara pihak-pihak, pejabat responden pertama menegaskan bahawa Datuk Wira akan mendengar saman itu sehingga kesimpulannya dan bahawa, jika pemohon mahu berbuat demikian, mereka boleh memohon untuk penarikan diri dan permohonannya untuk hakim lain untuk mendengar saman itu. Dalam permohonan mereka ini untuk kebenaran untuk memohon semakan kehakiman, pemohon memohon deklarasi bahawa keputusan responden pertama untuk menetapkan pendengaran saman itu kepada Datuk Wira tidak mempunyai asas yang sah – bahawa, sebenarnya, ia adalah ultra vires s 20 Akta Mahkamah Kehakiman 1964 ('AMK') dan menyalahi undang-undang kerana bersalahan dengan bukan sahaja s 20 tetapi juga perkara 122AA, 5(1) dan/atau 8(1) Perlembagaan Persekutuan. Mendakwa bahawa ia adalah tidak munasabah dan bertentangan dengan amalan biasa bagi seorang hakim yang telah dipindahkan keluar dari Kuala Lumpur ditugaskan untuk mendengar guaman di Kuala Lumpur, pemohon memohon perintah certiorari bagi membatalkan keputusan responden pertama dan satu perintah mandamus mengarahkannya untuk menugaskan seorang hakim bahagian sivil di Mahkamah Tinggi Kuala Lumpur untuk mendengar saman itu.

Diputuskan, menolak permohonan untuk kebenaran:

(1) Di bawah A 53 k 3(6) Kaedah-Kaedah Mahkamah 2012, suatu permohonan bagi semakan kehakiman hendaklah dibuat segera dan dalam mana-mana hal dalam tiga bulan dari tarikh bila alasan bagi permohonan itu mula-mula berbangkit atau bila keputusan itu mula-mula diberitahu kepada pemohon. Memandangkan pemohon telah memfailkan permohonan semakan kehakiman mereka pada 12 Jun 2015, mereka telah di luar masa sebanyak 29 hari. Ini berdasarkan fakta diakui bahawa keputusan responden pertama telah dimaklumkan kepada peguamcara pemohon oleh timbalan pendaftar pada 13 Februari 2015 semasa pengurusan kes guaman sivil itu. Kerana permohonan itu dibuat di luar masa yang ditetapkan oleh A 53 k 3(6), mahkamah ini tidak mempunyai bidang kuasa untuk mendengar yang sama. Permohonan itu oleh itu adalah remeh dan menyusahkan dan atas alasan ini sahaja perlu ditolak (lihat perenggan 13, 16 & 27).

(2) Hujahan pemohon adalah permohonan difailkan di dalam masa, oleh kerana masa hanya bermula daripada surat responden pertama bertarikh 16 Mac 2015 kepada perayu, telah dipatahkan dengan kandungan surat pemohon sendiri bertarikh 3 Mac 2015 kepada responden pertama menyatakan bahawa mereka telah dimaklumkan oleh timbalan pendaftar sewaktu pengurusan kes (pada 13 Februari 2015) bahawa guaman sivil itu dan apa-apa perkara interlokutori di dalamnya akan didengar oleh Datuk Wira meskipun yang kemudian telah dipindahkan ke Mahkamah Tinggi di Seremban. Hujahan pemohon adalah bahawa, ia tidak jelas pada tarikh pengurusan kes sama ada ia adalah responden pertama yang telah membuat keputusan, adalah satu percubaan yang lemah untuk melepasi tempoh had masa. Pemohon mengetahui selama ini bahawa keputusan itu telah dibuat oleh responden pertama dan surat mereka kepadanya semata-mata mencari pengesahan bahawa arahan sebegitu telah sebenarnya dibuat (lihat perenggan 17–18, 20 & 22).

(3) Arahan dan/atau keputusan responden pertama di bawah s 20 AKM berkaitan dengan pengagihan urusan dalam kalangan hakim-hakim Mahkamah Tinggi tidak boleh dengan mudah mendapat semakan kehakiman dan tidak pula boleh dirayu. Di bawah s 20, responden pertama mempunyai budi bicara dan kuasa mutlak untuk mengarahkan 'distribution of business' dalam kalangan hakim-hakim Mahkamah Tinggi Malaya dan membuat arahan yang bersifat am atau tertentu mengenai pengagihan urusan. Kuasa yang diperuntukkan di bawah s 20 AKM adalah semata-mata satu perkara dalam negeri tentang pengurusan dalaman menugaskan atau membahagikan kerja dalam kalangan hakim-hakim Mahkamah Tinggi dan oleh itu ia tidak memiliki elemen penting undang-undang awam untuk ia mendapat semakan kehakiman (lihat perenggan 28–31, 37 & 45).

(4) Jika arahan yang diberikan oleh responden pertama di bawah s 20 AKM terbuka untuk dicabar, ia akan membawa urusan Mahkamah Tinggi kepada kekacauan dan huru-hara kepada pentadbiran keadilan. Ini adalah alasan yang sangat kuat untuk mengecualikan daripada sifat kuasa yang telah dijalankan dalam kes ini, andaian umum bahawa kuasa yang berpunca daripada statut boleh dipohon semakan kehakiman. Seksyen 20 AKM memperuntukkan tiada syarat atau batasan pada menjalankan kuasa, yang mana perlu untuk menyuntik elemen undang-undang awam dalam keputusan dibuat supaya menarik remedi undang-undang pentadbiran (lihat perenggan 46–47).

(5) Walaupun s 20 AKM tidak memberi apa-apa hak, sama ada secara langsung atau tidak langsung, kepada pihak-pihak untuk membantah bahawa hakim yang ditugaskan untuk mendengar apa-apa prosiding patut digantikan dengan yang lain, ini tidak bermakna pihak tidak mempunyai remedi kerana mereka itu mempunyai hak dan kebebasan

untuk memohon penarikan diri mana-mana hakim yang ditugaskan untuk mendengar perkara mereka (lihat perenggan 48).

(6) Fakta kes ini menunjukkan guaman akan didengar oleh Datuk Wira menurut kuasa 'general' responden pertama untuk mengagihkan urusan lazim di Mahkamah Tinggi Kuala Lumpur. Setelah pemindahan Datuk Wira ke Mahkamah Tinggi Seremban, responden pertama membuat arahan menurut kuasa 'particular' nya untuk hakim tersebut untuk terus mendengar perkara itu. Kedua-dua arahan adalah manifestasi pelaksanaan kuasa yang diberikan kepada responden pertama oleh s 20 AKM. Jikapun Datuk Wira kekal di Mahkamah Tinggi Kuala Lumpur dan tidak dipindahkan, tidak akan ada apa-apa isu pendengaran guaman apabila permohonan penarikan diri telah ditarik balik (lihat perenggan 49–50).]

Notes

For a case on Chief Judge, see 2(3) *Mallal's Digest* (5th Ed, 2015) para 4826.

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145; [2010] 5 CLJ 865, FC (refd)

Chong Siew Choong v Public Prosecutor [1996] 5 MLJ 65, HC (refd)

Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia [2013] 2 MLJ 321, FC (refd)

Malacca Securities Sdn Bhd v Loke Yu [1999] 6 MLJ 112, HC (refd)

Manjit Singh s/o Kirpal Singh and Another v Attorney-General [2013] 2 SLR 844, CA (refd)

Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim [2011] 6 MLJ 490, FC (refd)

Mohit v DPP of Mauritius [2006] 1 WLR 3343, PC (refd)

R (on the application of Beer (trading as Hammer Trout Farm)) v Hampshire Farmers Market Ltd [2004] 1 WLR 233, CA (refd)

R v Secretary of State for Home Department, ex p Rushkanda Begum [1990] COD 107; [1990] Crown Office Digest 109, CA (folld)

Wong Kin Hoong & Anor (suing for themselves and on behalf all of the occupants of Kampung Bukit Koman, Raub, Pahang) v Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 MLJ 161, FC (refd)

WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296; [2012] 4 CLJ 478, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 18(2), 20
Federal Constitution arts 5(1), 8(1), 40, 122AA, 122B(1)
Legal Profession Act 1976 ss 90(1), (3)
Local Government and Housing Act 1989 [UK]
Rules of Court 2012 O 35 r 11, O 53 rr 3(2), (6)

Ashok Kandiah (Eugene Jayaraj with him) (Kandiah Partnership) for the applicants.
Amarjeet Singh a/l Serjit Singh (Senior Federal Counsel, Attorney General's Chambers) for the respondents.
Mohd Hafarizam Harun (Norhazira Abu Hayan and Nik Nuraisha Alia with him) (Hafarizam Wan & Aisha Mubarak) for the putative respondents.

Asmabi Mohamad J:

THE APPLICATION

[1] By this application ('encl 1') the applicant had sought for the following orders:

(a) a declaration that the Chief Judge of Malaya had acted without lawful basis in making the decisions dated 16 March 2015 ('the first decision') and/or 28 May 2015 ('the second decision') and pursuant thereto assigning Justice Datuk Wira Kamaludin bin Mohd Said ('the said judge') to hear Kuala Lumpur Civil Suit No 23NCVC-26–05 of 2014 ('the civil suit') ('the decisions');

(b) an order of certiorari to remove into the High Court of Malaya and to quash the decisions or any of them; and

(c) an order of mandamus directing the Chief Judge of Malaya to assign a judge of the Civil Division, Kuala Lumpur High Court to hear the civil suit.

THE FACTS STATED IN THE O 53 R 3(2) STATEMENT

[2] The facts which the applicants relied on to support the application for leave were as stated in the statement pursuant to O 53 r 3(2) Rules of Court 2012 ('the statement') ('encl 2'). These facts were verified by the second applicant for himself and the rest of the applicants in the affidavit affirmed on 12 June 2015 ('encl 3').

[3] The first applicant is a mass media company which owns the website known as www.malaysiakini.com, the second applicant is the editor-in-chief of the website and the third applicant is the chief editor of the website. The civil

suit was commenced by the second and third respondents on 30 May 2014 against all three applicants at the High Court of Malaya at Kuala Lumpur. A

[4] The chronology of events pertaining to the management of the civil suit could be summarised as follows: B

(a) the civil suit was case managed by the deputy registrar of the High Court on 18 June 2014, 8 July 2014 and second December 2014 respectively for purposes of exchanging of pleadings;

(b) on the first case-management date on 18 June 2014 the parties were informed that the *said judge was assigned* to hear the civil suit; C

(c) the applicants applied to recuse the said judge who was a judicial commissioner at the material time on the ground of conflict of interest, in light of the third respondent being responsible for advising the Yang di-Pertuan Agong under art 122B(1) of the Federal Constitution and the Yang di-Pertuan Agong is bound to act on the advice of the third respondent by virtue of art 40 of the Federal Constitution; D

(d) the application for recusal came up for hearing before the said judge on third September 2014 and was adjourned to 14 November 2014; E

(e) on 14 November 2014 the applicants withdrew the application for recusal as the said judge had by then been appointed as a judge of the High Court of Malaya;

(f) the defence and the counterclaim was filed on 17 December 2014; F

(g) on first January 2015 the said judge was transferred to the High Court of Malaya at Seremban;

(h) on 28 January 2015, the second and third respondents in the civil suit applied to strike out the defence and counterclaim of the applicants and for judgment to be entered in the civil suit ('the striking out application'); and G

(i) on 13 February 2015 the applicants were informed by the deputy registrar during case-management that the said judge was to continue hearing the civil suit and the striking out application. H

[5] The decision directing the said judge to hear the judgment application was viewed by the applicants as being inconsistent with the law and practice. The applicants (see para 11 of encl 2) averred that there was no basis in law and/or in fact: I

(a) for the direction under s 18(2) of the Courts of Judicature Act 1964 ('the CJA') or O 35 r 11 of the Rules of Court 2012 as the trial had yet to commence and pre-trial directions had yet to be given;

(b) for any direction for a judge other than a judge of the Civil Division of the Kuala Lumpur High Court to hear the 'striking out application'; and

(c) for the said judge to be directed to hear an application arising out of a civil suit filed in the Civil Division of the Kuala Lumpur High Court.

[6] In view of the direction, the applicants stated that they had through their solicitors vide the letter dated 3 March 2015 sought *confirmation from the Chief Judge of Malaya* as to whether such direction assigning the case to the said judge had in fact been made despite the said judge having been transferred to the High Court at Seremban. Vide the same letter the applicants' solicitors had also intimated that they have no objections for the same to be assigned to another judge of the Civil Division of the High Court at Kuala Lumpur for further conduct until final conclusion (see para 12 of encl 2).

[7] Subsequent to that they were exchanges of the letters between the applicants' solicitors and the special officer of the Chief Judge of Malaya, amongst others, the following were communicated:

(a) vide a letter dated 16 March 2015 the special officer confirmed that there was such a direction by the Chief Judge of Malaya for the said judge to hear the civil suit. The reason being as the said judge had managed the civil suit from the outset it was prudent for the said judge to hear the same. This was for purposes of expediency as the said judge was familiar with facts and the case file ('the first decision'). *The applicants had considered the letter dated 16 March 2015 as the letter which communicated the direction of the Chief Judge of Malaya pertaining to the distribution of the case to the said judge to hear* (see para 12.2 of encl 2);

(b) the applicants' solicitors responded vide a letter dated 31 March 2015 to impress upon the Chief Judge of Malaya that the said judge had never managed the case as the case-managements were at all times conducted by the deputy registrar. The solicitors emphasised that the said direction was a clear departure from the usual practice and that the Chief Judge of Malaya might not have been properly apprised of the facts when making the first decision;

(c) vide a letter dated 28 March 2015 (the date should be 28 April 2015) the special officer of the Chief Judge of Malaya informed the applicants' solicitors that the said judge had been directed to hear the civil suit until its conclusion. It was stated that since the said judge had heard applications arising from the said civil suit on 3 September 2015 and 14 November 2014 respectively with respect to the recusal application, it would be proper for the said judge to hear the case until its conclusion;

(d) vide a letter dated 20 May 2015 the applicants' solicitors clarified that the said judge had merely dealt with the recusal application that came up

before the said judge on 3 September 2014 and the same was adjourned to the 14 November 2014 where counsel merely appeared before the said judge to withdraw the application. The applicants were of the view that there was a misconception of the true state of affairs and urged that the first decision be reconsidered; and

(e) vide a letter dated 28 May 2015 the special officer of the Chief Judge of Malaya reiterated the position that the said judge had been directed to hear the civil suit until its conclusion and if the applicants had their reservations for whatever reasons they deem fit, they were at liberty to apply for the recusal of the said judge and they might also apply for the civil suit to be heard by another judge ('the second decision'). *This second decision was considered by the applicants to be a separate decision by the Chief Judge of Malaya refusing to reconsider the first decision* (see para 12.10 of encl 2).

THE GROUNDS FOR JUDICIAL REVIEW

[8] The decisions which the applicants were seeking this court to quash and/or the declarations, which the applicants were seeking from this court were as follows:

(a) the first decision made vide the letter dated 16 March 2015 and the direction of the Chief Judge of Malaya assigning the said judge to hear the civil suit; and

(b) the second decision made vide the letter dated 28 May 2015 and the refusal of the Chief Judge of Malaya to reconsider the decision assigning the said judge to hear the civil suit.

[9] The grounds relied by the applicants could be gleaned from the statement filed pursuant to O 53 r 3(2) of the Rules of Court 2012 and the gists were as follows (see paras 14 and 15 of encl 2):

(a) the Chief Judge of Malaya acted ultra vires s 20 of the CJA and/or with no legal basis in making each or either of the decisions;

(b) that even if the Chief Judge of Malaya is seized with power to make the decisions, His Lordship had failed to take into consideration the following:

(i) there was no basis for the said judge to be assigned to hear the civil suit as the said judge had been assigned to the High Court at Seremban; and

(ii) the decisions were inconsistent with the usual practice. Thus, the civil suit was being treated differently from other civil suits filed in the Civil Division of the Kuala Lumpur High Court and giving rise

to an impression that is inconsistent with the due administration of justice.

(c) the decisions, or either of these decisions, were illegal for being:

(i) contrary to s 20 of the CJA and/or art 122AA of the Federal Constitution;

(ii) contrary to arts 5(1) and/or 8(1) of the Federal Constitution; and

(iii) unreasonable.

THE LAW

[10] It is settled law, the function of the court in exercising its power to grant leave for judicial review is to sieve through the application before it by examining the facts and the law and decide if the case is one which is frivolous and or one which merits further argument on the substantive motion. In exercising this function the court is guided by the principles laid down by the Court of Appeal in England in *R v Secretary of State for Home Department, ex p Rushkanda Begum* [1990] COD 107; [1990] Crown Office Digest 109, Dip as follows:

(a) if it is clear to the judge that there is a point for further investigation on a full inter parte basis with all evidence as is reasonably necessary on the facts and all such arguments on the law then leave ought to be granted;

(b) if the judge hearing the leave application is satisfied that there is no arguable case the judge should dismiss the application for leave to move for leave for judicial review;

(c) if the judge is not really sure whether there is or is not an arguable case, the judge may invite the putative respondent to attend and submit as to whether or not leave ought to be granted; and

(d) in exercising the powers in an inter parte leave application the test applicable by the court must be the same approach as that as the test adopted in deciding whether to grant leave to appeal against the arbitrator's award. The court has to consider the facts and law before it and ask itself whether the court is satisfied that there is a case fit for further consideration or otherwise.

[11] The Federal Court had elaborated and reiterated the test for granting leave in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 CLJ 478 as follows:

> Leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the reliefs sought at the substantive hearing may be the resultant outcome. A rider must be attached to the

application though ie unless the matter for judicial *review is amenable to judicial review* no success may be envisaged. (Emphasis added.)

(see *Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim* [2011] 6 MLJ 490)

[12] Based on the above high authorities the applicants applying for leave to be granted must show the following:

(a) the point taken is not frivolous and vexatious;

(b) leave would be granted if the point taken justifies an arguable case in favour of granting the reliefs sought at the substantive stage; and

(c) the matter raised is amenable for judicial review.

THE ISSUES

Issue 1: whether the application is frivolous and vexatious as it was not made within the time prescribed in O 53 r 3(6)

[13] The time within which an application for judicial review must be filed is provided in O 53 r 3(6) of the Rules of Court 2012:

An application for judicial review shall be made promptly and in any event *within three months from the date when the grounds of application first arose* or *when the decision is first communicated to the applicant*. (Emphasis added.)

[14] Compliance with the time frame prescribed under O 53 r 3(6) is fundamental as it affects the jurisdiction of the court to hear the application. The law on this subject is trite. It is mandatory to comply with the time frame in O 53 r 3(6). This principle had been emphasised by the Federal Court in *Wong Kin Hoong & Anor (suing for themselves and on behalf all of the occupants of Kampung Bukit Koman, Raub, Pahang) v Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 MLJ 161 at p 171 as follows:

In conclusion, we are of the view that the time frame in applying for judicial review prescribed by the Rules is fundamental. It goes to jurisdiction and once the trial judge had rejected the explanation for the delay for extension of time to apply for judicial review, it follows that the court no longer has the jurisdiction to hear the application for leave for judicial review. *Whether the application has merits or not, is irrelevant.* (Emphasis added.)

[15] Once the issue of limitation had been raised, the merits of the case is irrelevant for the court to consider. It follows from this that the threshold at

leave stage of a judicial review hearing being low is also irrelevant. The only question at this stage is whether, on the facts disclosed in the statement, the application is filed out of time.

[16] Since the applicants filed the judicial review application on 12 June 2015, the application was filed 29 days out of time. This is based on the admitted fact that the decision was communicated to the applicants' solicitors by the deputy registrar on 13 February 2015 during the case management of the civil suit (see letter dated 3 March 2015 at p 288 of encl 3).

[17] The applicants' contended that the application was filed within time as time only began to run from 16 March 2015 which was the date when decision of the Chief Judge of Malaya assigning the said judge to hear the civil suit was first communicated to the applicants in a letter by the Chief Judge of Malaya.

[18] The applicants' contention was rebutted by the contents of their own letter dated 3 March 2015 to the Secretary of the Chief Judge of Malaya. In this letter, the applicants' solicitors stated that they were informed by the deputy registrar during case management that the civil suit and any interlocutory matters therein would be heard by the said judge despite the fact that His Lordship had been transferred to the High Court at Seremban. This could be gleaned from the language and the tone of the letter (see p 288 of encl 3):

> Pada masa *Pengurusan Kepada 13-2-2015* di hadapan Timbalan Pendaftar Puan Mazuliana Binti Abdul Rashid, pihak-pihak dimaklumkan bahawa tindakan di atas, serta permohonan-permohonan interlokutori akan masih didengar oleh Yang Arif Hakim Datuk Wira Kamaludin bin Md Said, walaupun YA telah dipindahkan ke Mahkamah Tinggi Seremban. (Emphasis added.)

[19] The case management is a pre-trial judicial process and the forum for orders and directions concerning the case to be given by the judicial officer in order to prepare the file for hearing. Hence, the decision was in fact communicated to the applicants on 13 February 2015. In the circumstances, the applicants were required to file their application challenging the decision on or before 14 May 2015, if they felt that what was done in this case was out of the ordinary and/or usual process and/or to lodge an appeal against the direction.

[20] The contention by the applicants that it was not apparent at the case management date whether it was the Chief Judge of Malaya who had made the decision is a feeble attempt to get around the limitation period. The following admissions which appeared on the face of the material placed before this court showed that the applicants knew all along that the decision was made by the Chief Judge of Malaya:

(a) the applicants stated in their statement (see para 12 of encl 2):

> In view of this curious state of affairs, the Applicants had through their solicitor *written to the 1st Respondent* (who is the Chief Judge of Malaya) *to seek confirmation of whether a direction to that effect had been made.* (Emphasis added.)

(b) the applicants also stated in their statement (see para 12.1 of encl 2) that:

> It was indicated in the same letter that, in the light of the pleadings just being closed, the Applicants had *no objections for the matter to be assigned to another judge of the Civil Division of the Kuala Lumpur High Court.* (Emphasis added.)

[21] In the letter dated 3 March 2015 (see p 288 of encl 3) the applicants' solicitors stated:

> Dalam keadaan di atas, kami dengan rendah diri memohon supaya diberikan pandangan serta balasan *daripada Yang Amat Arif untuk dasar keputusan tersebut*. (Emphasis added.)

[22] The above statements clearly indicated that the applicants knew that only the Chief Judge of Malaya could make such a direction and a direction to that effect had been made. It is pertinent to note that the letter was merely seeking confirmation that such a direction was in fact made by the Chief Judge of Malaya.

[23] The applicants further contended that the second decision in the letter dated 28 May 2015 was a separate decision wherein the Chief Judge of Malaya refused to reconsider the first decision.

[24] The above contention is rebutted by the contents of the letter dated 28 May 2015 which is self-explanatory. The letter reiterated the position held all along by the Chief Judge of Malaya and the reply to the applicants request for reconsideration of the direction was answered in the following words:

> Saya diarahkan oleh YAA Hakim Besar Malaya untuk merujuk kepada tersebut di atas dan surat tuan rujukan 1254.14.AK bertarikh 20 Mei 2015.
>
> 2. *Seperti tuan sedia maklum*, YA Datuk Wira Kamaludin bin Md Said telah ditugaskan untuk mendengar kes ini sehingga selesai. *Sekiranya pihak tuan masih ingin Hakim yang lain untuk mendengar kes ini, pihak tuan mempunyai kebebasan untuk memfailkan permohonan pengecualian Hakim daripada mendengar kes ini.* (Emphasis added.)

[25] The reply by the Chief Judge of Malaya was a direct response to the applicants' solicitors request in the letter dated 20 May 2015 which states as follows:

> Oleh kerana perkara dinyatakan diatas makluman *anak guam kami adalah berasa tidak berasa selesa dengan perkembangan di dalam kes ini khususnya arahan untuk YA untuk mendengar kes ini* yang adalah merupakan satu pelepasan daripada amalan lazim atau biasa.
>
> *Maka, kami diarahkan untuk meminta* supaya arahan tersebut dipertimbangkan semula demi kepentingan integrity system kehakiman. (Emphasis added.)

[26] The contents of the letter dated 28 May 2015 must be considered with the above stated facts in mind. The Chief Judge of Malaya through his special officer had replied stating that the applicants' solicitors were aware that the said judge had been directed to hear the case until its conclusion and that if the applicants still wanted another judge to hear the case they were at liberty to make an application for the recusal of the said judge from hearing the case. It is not as if the applicants had reached a brick wall. There is a proper avenue opened to the applicants for the said judge to be recused from further conduct of the case by way of a formal application.

[27] Based on the aforesaid the application was made out of the time prescribed by O 53 r 3(6) of the Rules of Court and therefore this court has no jurisdiction to hear the same. The application is therefore frivolous and vexatious and on this ground alone, the application ought to be dismissed with costs.

Issue 2: s 20 of the CJA is not amenable to judicial review

[28] The directions and or decisions pertaining to the distribution of business among judges of the High Court by the Chief Judge of Malaya is not amenable to judicial review. Section 20 of the CJA which governs the distribution of business in the High Court reads as follows:

> The distribution of business among the Judges of the High Court *shall be made in accordance with such directions*, which may be of *a general or a particular nature*, as may be given by the Chief Judge. (Emphasis added.)

[29] The language used in s 20 of the CJA is clear and unambiguous. The provision empowers the Chief Judge of Malaya to make directions of a general or particular nature concerning the distribution of business among the judges of the High Court. It is mandatory for the judges of the High Court to comply with such directions by the use of the words 'shall be made in accordance with such directions'.

[30] Under s 20 of the CJA, the Chief Judge has an absolute power in relation to the distribution of the business among the judges of the High Court of Malaya. Section 20 of the CJA was considered in *Chong Siew Choong v Public*

Prosecutor [1996] 5 MLJ 65 at p 70 by His Lordship Abdul Malik Ishak J and His Lordship held as follows:

> In my opinion, s 20 of the Act *gives an absolute power* to the Chief Judge to distribute 'business' among judges of the High Court in accordance with the directions which he may give of a general or particular nature. (Emphasis added.)

[31] There can be no appeal against the direction of the Chief Judge under s 20. In *Malacca Securities Sdn Bhd v Loke Yu* [1999] 6 MLJ 112 His Lordship Augustine Paul held as follows:

> Thus the section deals with the allotment or dispensing of work among the judges of the High Court in accordance with directions given by the Chief Judge. *The nature of this function is clearly administrative in nature. It must be observed that the exercise of this power by the Chief Judge also includes a direction which can be given with respect to a single case.* This flows from the use of the words '... a particular nature' in the section which means that the Chief Judge may direct that a particular case shall be heard by a particular High Court Judge. It would also include the sending of a case file pending before a judge of the High Court to another judge of the High Court at a different branch. A party who desires to have a case pending in a particular High Court to be heard by another High Court may therefore apply to the Chief Judge for directions to that effect. *Needless to say there can be no appeal against any direction given by the Chief Judge*. (Emphasis added.)

[32] Upon reading s 20 of the CJA and guided by the interpretation given by the two learned justices in the above cited cases it is apparent that the Chief Judge's power under this provision is discretionary and/or administrative in nature and in exercising His Lordship's powers under the said section His Lordship is vested with an absolute power.

Whether the direction of the chief judge of malaya is amenable to judicial review

[33] The next issue for determination is whether the direction of the Chief Judge of Malaya made pursuant to s 20 of the CJA is amenable to judicial review.

[34] The applicants contended that the administrative power of the first respondent in respect of the distribution of business is clearly one of an administrative nature, and one made in public law. It is a power conferred by statute. According to the applicants all the criteria laid down in the authorities cited above were established on the facts of the case before the court.

[35] In supporting their case the applicants relied on Federal Court's decision in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145; [2010] 5 CLJ 865; the Court of Appeal decision in *R (on the application of Beer (trading as Hammer Trout*

Farm)) v Hampshire Farmers Market Ltd [2004] 1 WLR 233; the Singapore Court of Appeal decision in *Manjit Singh s/o Kirpal Singh and Another v Attorney-General* [2013] 2 SLR 844.

[36] The Federal Court's decision in *Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia* [2013] 2 MLJ 321 at p 332 for instance reinforces the proposition that whether a discretionary decision made pursuant to a statute is amenable to judicial review or otherwise would depend on the facts of each particular case. The Federal Court held as follows:

> We have no hesitation in accepting that the executive's discretion whether by statute or prerogative is amenable to judicial review. However, whether such discretion is amenable to judicial review is dependent on the facts of each case (see *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 652. *It is generally held in those cases that not every decision of the executive could be subjected to judicial review).* (Emphasis added.)

[37] The power provided under s 20 of the CJA is *exclusively a domestic matter concerning the internal management of allotting or dispensing of work among the judges of the High Court* and therefore does not possess the necessary public law element for it to be amenable for judicial review. From the authorities cited it is clear that not every administrative decision is amenable to judicial review.

[38] In *Ahmad Jefri* the Federal Court laid down the parameter of matters amenable for judicial review in the following passage:

> [22] It is widely accepted that not every decision made by an authoritative body is suitable for judicial review. *To qualify there must be sufficient public law element in the decision made. For this, it is necessary to examine both the source of the power and the nature of the decision made*; whether the decision was made under a statutory power *(see para 61 Halsbury Laws of England, 4th edn, 2001 Reissue, vol 1(1))*. (Emphasis added.)

[39] *Ahmad Jefri*, concerned the dismissal of a government officer from public service. The Federal Court found the presence of the public law element from both the source and the nature of the decision itself. The court held:

> [35] ... The appellant was an officer within reg 3 of the Public Officers (Conduct and Discipline) Regulations 1993 (Amended) 2002 (the Regulations). 'Officer' under this regulation 'means a member of the public service of the Federation'. This Regulation is a statutory enactment made pursuant to cl (2) of art 132 of the Federal Constitution and it applies to an officer throughout the period of his service.
>
> [37] ... the decision to dismiss the appellant was made under a statutory law by a body who acted within the scope of such statutory power. Though this decision involves the dismissal of an employee by an employer, much like a master dismissing

his servant, which is a private law matter, *the fact that there are statutory conditions and restrictions imposed by the Regulations on the conduct and dismissal* of the appellant *underpins the public law element* in this case ... *Here, a special statutory provision bearing directly upon the right of a public authority to dismiss the appellant. This injects the element of public law necessary in this context to attract the remedies of administrative law making this case amenable for judicial review.* (Emphasis added.)

[40] *R (Beer)*, defined public law element as follows:

It seems to me that the law has now developed to the point where, *unless the source of power clearly provides the answer, the question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavor or character to bring it within the purview of public law*. It may be said with some justification that this criterion for amenability is very broad, not to say question-begging. *But it provides the frame for the investigation that has to be conducted.* (Emphasis added.)

[41] In order to appreciate the subject matter at hand the facts in *R (Beer)* could be examined as follows:

(a) a county council acting under the Local Government and Housing Act 1989 had set up a farmers' market. Pursuant to the council's statutory powers the running of the farmers' market was subsequently handed to a company limited by guarantee;

(b) the company instead had refused to grant the claimant a licence to participate in a farmers' market programme. The Court of Appeal held that base on the factual matrix of the case the company had stepped into the council's shoes and was performing the same functions as the council had previously performed;

(c) the company was not a private company established to run markets for profit but to take over for a non-profit basis the running of markets previously operated by the council in the exercise of its statutory powers in what was considered to be in the public interest; and

(d) the facts clearly showed that the company's functions were of a public nature. Hence, the company's decision to refuse the claimant's application for a licence was amenable to judicial review.

[42] In *Manjit Singh s/o Kirpal Singh and Another v Attorney-General* [2013] 2 SLR 844 the Singapore Court of Appeal had the opportunity to deal with the question whether, in some circumstances, a power conferred by statute may not be amenable to judicial review. In the course of resolving the issues in the case, the court referred to the Privy Council case of *Mohit v DPP of Mauritius* [2006] 1 WLR 3343 which held as follows:

A [28] ... the fact that a particular power stems from statute should ordinarily mean that it is amenable to judicial review in absence of compelling reasons to the contrary.

[32] ... *Where there is a compelling reason which indicates the absence of such a public element in what is nonetheless a statutory power or duty, there would be no good reason to subject the exercise of such a power or duty,* which may already be governed by private law obligations and remedies, *to public law remedies in judicial review proceedings.*

[33] *We therefore reject the appellants' broad submission that all statutory powers are necessarily amenable to judicial review.*

[43] The case of *Manjit Singh* related to the power of the Chief Justice pursuant to s 90(1) of the Legal Profession Act to appoint a disciplinary tribunal to investigate complaints lodged with the Law Society and to revoke any such appointment made under s 90(3). The appellants objected to the appointment of an ex-judge to head the disciplinary tribunal on the grounds that the relationship of the ex-judge with certain persons would put him in a position that he would not be able to exercise his powers in an objective and impartial manner. The appellants had requested that the ex-judge to be replaced with another person. The Court of Appeal held that the exercise of this power was amenable to judicial review. It is obvious from the statutory provisions that the Chief Justice's power of appointment and revocation would be based on certain conditions and limitations which has injected the necessary element of public law in the decision making process.

[44] The analysis of the above cited cases disclosed that the public law element is necessary for a decision to be amenable to judicial review. The source of the power derived from a statute is not conclusive unless clear on the face of the provision. Hence, the court would have to examine the nature of the power and function that has been exercised in order to determine whether the decision has sufficient public element, flavor or character to bring it within the purview of public law.

What is the nature of Chief Justice's power under s 20 of the CJA

[45] The nature of the power exercised by the Chief Judge of Malaya pursuant to s 20 of the CJA is discretionary. The power concerns the internal management of the High Court and the Chief Judge of Malaya is conferred absolute discretion to manage the distribution of work in the High Court of Malaya. It is His Lordship's management's prerogative to determine how the allotting or dispensing of work among the judges of the High Court is to be done.

[46] It is a matter of grave public interest that directives given by the Chief

Judge of Malaya under s 20 are not opened to challenge. Such actions would bring the business of the High Court to a grind. If the direction for the distribution of cases among judges could be challenged this in turn would bring chaos to the administration of justice through delays and adjournments. This is a strong compelling reason to exclude the general assumption that power that stems from statute is amenable to judicial review from the nature of the power that was exercised in this case.

[47] There is also no or insufficient public element, flavor or character to bring a decision directing a particular judge to hear a case within the purview of public law. The section provides no conditions or limitations in the exercise of the power, which is necessary to inject the element of public law in the decision made so as to attract the remedies of administrative law.

[48] Section 20 of the CJA is declaratory in nature. It requires that the business of the High Court is carried out as directed by the respective Chief Judges. The provision does not confer any right, whether directly or by implication, on the parties to object that the judge assigned to hear any proceeding ought to be replaced by another judge. This does not mean that the parties are without remedy as the parties have the right and are at liberty to apply for recusal of any judge assigned to hear their matter. This judicial avenue is provided and often resorted to by litigants.

[49] The facts in the case at hand showed that the suit was to be heard by the said judge pursuant to the Chief Judge of Malaya's 'general' power of the distribution of business of the High Court prevailing at the Kuala Lumpur High Court. Upon his transfer to the High Court at Seremban the Chief Judge made a direction pursuant to his 'particular' power for the said judge to continue hearing the matter. Both directions are but the manifestation of the exercise of power conferred upon the Chief Judge by s 20 of the CJA.

[50] Therefore, on the facts disclosed had the said judge not been transferred and remained in the High Court at Kuala Lumpur there would have been no issue for him hearing the suit upon the recusal application having been withdrawn.

CONCLUSION

[51] In the light of the above reasonings I am of the view that leave ought not to be granted to the applicants to pursue the matter on the substantive motion. Enclosure 1 is therefore dismissed with costs of RM5,000 to be awarded to the Attorney General's Chambers.

Application for leave dismissed.

Reported by Ashok Kumar